

No. 89-1275

Supreme Court, U.S.

FILED

APR 6 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D., JOSEPH DiLALLO, M.D.,
PAUL R. FRANZ, D.C., PHYLLIS LaFLAMME, R.N., MARY
C. MAJOR and MARY ANN HAMBURGER,

Respondents.

*On Petition for a Writ of Certiorari to the Supreme Court of
New Jersey*

BRIEF IN OPPOSITION FOR RESPONDENT ROBERT I. OBERHAND, M.D.

JOHN P. MC GEE
MC DERMOTT AND MC GEE

*Attorneys for Respondent
Robert I. Oberhand, M.D.*

64 Main Street
Millburn, New Jersey 07041
(201) 467-8080

JOHN P. MC GEE
GREG RILEY
On the Brief

10293

Fitz
Appellate
Printers, Inc.

* NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 425-6500 • USA (800) 3 APPEAL

BEST AVAILABLE COPY



QUESTION PRESENTED

Does the mere fact that the jury requested certain testimony to be read back imply that its verdict was speculative and consequently a violation of petitioners' right to procedural due process?

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Summary of Argument	6
Reasons for Denying the Writ:	
I. The Court is without jurisdiction to grant the writ of certiorari because petitioners failed to adequately raise their constitutional claims below.	8
A. Petitioners Failed to Appeal the Judgment to the New Jersey Supreme Court.	8
B. Petitioners Failed to Adequately Raise Their Constitutional Claims in the State Courts.	11
C. Petitioners' Constitutional Claims Were Not Decided in the State Courts Below.....	12
D. The Petition is Procedurally Defective Because Petitioners Have Failed to Comply with Rule 21.1(h).	13

Contents

	<i>Page</i>
II. No special reasons exist to grant the petition for a writ of certiorari.	13
III. Petitioners' failure to object to the charge or the portions of testimony which were read back to the jury constitute an independent and adequate state ground to support the judgment.	15
IV. The petition should be denied because the record does not demonstrate any violation of petitioners' right to due process.	16
Conclusion	19

TABLE OF CITATIONS

Cases Cited:

Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969)	12
Ellis v. Dixon, 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 (1955)	12, 13
Evers v. Dollinger, 471 A.2d 405, 95 N.J. 399 (1984)	5, 15, 18
Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d, 837 (1963)	14
Ford v. Reichert, 129 A.2d 439, 23 N.J. 429 (1957).	16

Contents

	<i>Page</i>
Gaido v. Weiser, 545 A.2d 1350, 227 N.J. Super. 175 (App. Div. 1988), aff'd, 558 A.2d 845, 115 N.J. 310 (1989)	16
Gluckauf v. Pine Lake Beach Club, Inc., 187 A.2d 357, 78 N.J. Super. 8 (App. Div. 1963)	16
Hake v. Manchester Township, 486 A.2d 836, 98 N.J. 302 (1985)	18
Kligman v. Lautman, 251 A.2d 745, 53 N.J. 517 (1969)	10
McAllister v. United States, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 26 (1954)	8, 17
Mississippi Power v. Moore, 487 U.S. ____ , 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988)	12
N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951)	14
Oxley Stave Co. v. Butler County, 166 U.S. 648, 17 S. Ct. 709, 41 L. Ed. 1149 (1897)	12
Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)	12
Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954)	7, 14
Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969)	13

*Contents**Page*

Tidewater Oil Co. v. Mayor and Council of Carteret, 209 A.2d 105, 44 N.J. 338 (1965)	10
---	----

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981)	7, 11
---	-------

Statutes Cited:

28 U.S.C. § 1257	12, 18
28 U.S.C. § 1257(a)	2, 7, 8, 11
28 U.S.C. § 1257(2)	12

United States Constitution Cited:

Fourteenth Amendment	8, 11, 14
----------------------------	-----------

Rules Cited:**United States Supreme Court Rules:**

Rule 17	7, 14
Rule 17.1(b) and (c)	14
Rule 21.1(h)	7, 13
Rule 21.5	7, 13

New Jersey Court Rules:

Rule 1:7-2	7, 15
------------------	-------

Contents

	<i>Page</i>
Rule 1:16-1	12
Rule 2:2-1	9
Rule 2:2-1(a)(1)	10
Rule 2:2-3(a)	9
Rule 2:12-4	10
New Jersey Evidence Rule 41	12
New Jersey Rule of Professional Conduct 3.5	12

Other Authorities Cited:**New Jersey Constitution, 1947:**

Art. 6, § 2, ¶ 2	9
Art. 6 § 3, ¶ 2	8
Art. 6 § 3, ¶ 3	8
Art. 6 § 5, ¶ 1	7, 9, 10
Art. 6, § 5, ¶ 2	9

APPENDIX

New Jersey Constitution, 1947	1a
New Jersey Court Rules	1a

No. 89-1275

In The

Supreme Court of the United States

October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D., JOSEPH DiLALLO, M.D.,
PAUL R. FRANZ, D.C., PHYLLIS LaFLAMME, R.N., MARY
C. MAJOR and MARY ANN HAMBURGER,

Respondents.

*On Petition for a Writ of Certiorari to the Supreme Court of
New Jersey*

**BRIEF IN OPPOSITION FOR RESPONDENT
ROBERT I. OBERHAND, M.D.**

STATEMENT OF THE CASE

This is a case of alleged professional negligence. The issues

are confined solely to those involving state law. Respondent submits there is no basis to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

On March 31, 1983, petitioner Rosella O'Grady suffered a subarachnoid hemorrhage from a ruptured aneurysm of the right middle cerebral artery which left her paralyzed from the neck down. Petitioners brought suit against Dr. Robert Oberhand, an otolaryngologist, and Dr. Joseph DiLallo, a family practitioner, alleging generally a failure to properly diagnose headaches complained of by petitioner prior to the hemorrhage.¹ A jury verdict was rendered in favor of both respondents finding, in response to special interrogatories, that both were not professionally negligent. Thus, petitioners' assertion of negligence being "uncontested" as framed in the questions presented represents a gross distortion of the facts.

Dr. Bennett Derby, a neurologist, testified as one expert for petitioners. He explained, as did other witnesses, that an aneurysm is "a little bulge or out-pocketing on the wall of an artery," like a bubble on a tire tube (19T179:8-14).² He agreed with the expert for respondents, Dr. Howard Medinets, that an aneurysm was caused by a congenital defect in the wall of the artery. It was petitioners' theory through Dr. Derby and other experts that the ruptured aneurysm was preceded by a warning or sentinel bleed

1. Petitioners also sued Dr. Paul Franz, a chiropractor, and Mary C. Major, Phyllis La Flamme and Mary Ann Hamburger, who were office employees of Dr. DiLallo. The complaint against Dr. Franz was dismissed on summary judgment prior to trial. Petitioners voluntarily dismissed their claims against the employees of respondent DiLallo prior to their appeal to the Superior Court of New Jersey, Appellate Division.

2. The citation "T" refers to the transcript of the trial. The prefix number refers to the date of the testimony. The suffix refers to the page, and then, where applicable, the line numbers.

on March 4, 1983, and that this bleed caused Mrs. O'Grady's headache (19T181:6-183:11). Both Dr. Derby and Dr. Charles Duncan, a neurosurgeon, testified that Dr. Oberhand was negligent for not referring Mrs. O'Grady for immediate neurological assessment (19T190:1-10, 20T52:21-53:4).

Respondent Oberhand undermined petitioners' case from more than one direction. Headaches, being such a common ailment, he denied negligence for failing to refer Mrs. O'Grady. Indeed, petitioner Frank O'Grady admitted that his wife had suffered from migraine headaches (19T132:16-13), and sinus headaches (19T133:4). He also conceded that she had injured her neck exercising on the 1st or 2nd of March (23T28:19-25) and that she had some history of arthritis (23T33:10-14). Respondent also challenged the allegation of professional negligence by attacking causation with an overwhelming amount of evidence, which would have permitted the jury to conclude that petitioner's headaches were most likely attributable to causes other than a sentinel bleed (which also compounded the difficulty of making an accurate diagnosis had there been a bleed). Finally, respondent contended that even if petitioner had been referred for neurological workup, it was unlikely that the aneurysm would have been detected.

Dr. Howard Medinets, a neurosurgeon, was called as an expert witness on behalf of Dr. Oberhand on the issue of causation. He testified that petitioner suffered a spontaneous subarachnoid and intracerebral hemorrhage from a congenital aneurysm of the middle cerebral artery at its first bifurcation (25T152:23-153:1). He explained that the middle cerebral artery is a major artery within the substance of the brain, and when it ruptures and bleeds into the substance of the brain, the intracerebral hemorrhage, because of the location has a devastating injury and effect (25T149:20-150:9). Dr. Medinets went on to explain that the subarachnoid hemorrhage had to occur on March 31, 1983 and

not earlier because a bleed in such a location is a disastrous occurrence. "It is a catastrophe, like an explosion inside of the head." The damage from this type of bleeding is necessarily very severe and the brain is damaged (25T167:2-15). The brain is damaged from the blood which is actually in the brain (25T167:16-17). "All of the evidence indicates that she did not have bleeding prior to 3/31." (25T170:8-9).

Respondent submitted further proof that even if petitioner had been referred for a neurological assessment, the aneurysm would not had been discovered. Dr. Derby gave the opinion that if petitioner had been referred to neurologist or neurosurgeon, he would have obtained a CAT scan of the head which would have shown the aneurysm (19T190:14-25). Dr. Medinets disagreed. He testified that the aneurysm was too small to have been detected on a CAT scan (25T158:13-159:8). Indeed, Dr. Medinets related that the CAT scan taken on March 31, 1983 after petitioner collapsed, failed to show the aneurysm (25T154:25-155:4). The aneurysm was only later confirmed through an arteriogram done on July 19, 1983 (25T166:11-17).

Mrs. O'Grady saw respondent Oberhand on only two occasions after her headaches began. Dr. Roger Miles Rose, a board-certified otolaryngologist, testified as an expert on behalf of petitioners. While Dr. Rose delivered an opinion that the care rendered by Dr. Oberhand on March 14th deviated from the accepted standard of medical care because he failed to refer the patient for evaluation by a neurologist or a neurosurgeon, he testified that the treatment which Dr. Oberhand gave on March 7th was appropriate for what he found (20T161:1-4). Thus, if believed, the jury had only the visit of March 14 to evaluate to determine the propriety of the treatment rendered by respondent. Moreover, Dr. Rose agreed that it was a matter of judgment in making a decision whether to treat, to refer the patient, or to determine whether it was an emergency (20T167:7-18). He also

related that it was a matter of judgment in evaluating a patient and how he presents himself with a complaint of headaches (20T168:8-169:3).

As part of their argument, petitioners claim that the trial court failed to properly charge the jury on the issue of causation, in particular failing to give a "loss of a chance" charge as set forth in *Evers v. Dollinger*, 471 A.2d 405, 95 N.J. 399 (1984). However, there was no objection by petitioners to the charge as given by the trial judge, and no request for an *Evers* charge³ (26T221:12-16). Likewise, petitioners failed to object to any testimony which was read back in response to the requests of the jury (26T:243-248). Moreover, the trial judge invited the jury to request additional testimony if the passage selected was wrong (26T245:2-18).

As previously noted, the jury returned a verdict finding that both respondents were not professionally negligent. Since the jury concluded that neither respondent was negligent, they did not render a verdict on the issue of proximate cause.⁴

Petitioners moved for a new trial on the ground that the verdict was against the weight of the evidence. The court denied the motion and delivered an oral opinion from the bench. It stated in part:

I believe that the verdict is not against the weight of

3. Furthermore, petitioners did not claim the charge was in error on their appeal to the Superior Court, Appellate Division. The petitioners first raised this issue in the petition for certification to the N.J. Supreme Court at p. 16 where they conceded it had not been raised below and urged "plain error." See Point III herein.

4. The issues of negligence and causation were submitted as separate interrogatories to the jury.

the evidence. I believe there is not a miscarriage of justice. I believe that this is an unfortunate situation where people — that the human body is a delicate mechanism that none of us truly understand, even doctors. [4/24T19:15-20; see Petitioners' Appendix at p. 14a.]

The question is "Did he deviate from accepted standards of that profession? I find that the jury, had I been sitting on the jury, having listen to all the evidence I would have voted the same way the jury voted. I believe that the jury had all of the evidence. [4/24T18:19 24; see Petitioners' Appendix at p. 14a.]

. . . Not only that, but the testimony was, which supports, more than supports, but had the Defendant, Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think he would have met that burden, had the burden been on the other side. [4/24T17:9-15; see Petitioners' Appendix at pp. 12a-13a.]

The record is devoid of any complaint by petitioners of a denial of their due process rights under the Fourteenth Amendment. Not only is the jury verdict supported by the evidence, it is a proper and just verdict which should not be disturbed by this Court.

SUMMARY OF ARGUMENT

The petition seeks review of a judgment of the Superior Court of New Jersey in favor of respondents in an action alleging professional negligence. Petitioners seek to invoke the jurisdiction

of this Court pursuant to 28 U.S.C. § 1257(a), claiming a violation of their right to procedural due process.

Respondent contends that the Court is without jurisdiction to grant the petition because petitioners failed to adequately raise their constitutional claims below. Although favored with an appeal as of right to the New Jersey Supreme Court for matters involving a question arising under the Constitution of the United States, petitioners elected to seek discretionary review by petitioning for certification which was denied. New Jersey Constitution, 1947, Article 6, § 5, ¶ 1. Thus, petitioners claims were not presented to the "highest court of a state" which is required under 28 U.S.C. § 1257(a) for this Court to exercise its jurisdiction. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981). Moreover, on their petition for certification to the New Jersey Supreme Court, petitioners failed to raise their constitutional claims. Additionally, neither of the appellate opinions below indicates that those courts actually decided the constitutional issues now alleged by petitioners. That petitioners failed to adequately raise their claims below can be inferred from their lack of compliance with this Court's Rule 21.1(h) which subjects the petition to possible denial under Rule 21.5.

Second, the petitioner does not set forth any "special and important reasons" for issuing a writ of certiorari. Rule 17 and *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954).

Third, the judgment below is supported on independent and adequate state grounds. Namely, petitioners neglected to preserve their right to appellate review by failing to object to the charge, or the portions of testimony which were read back to the jury and of which they now complain. N.J. Court Rule 1:7-2.

Finally, the record fails to demonstrate any violation of

petitioners' right to due process. Petitioners' claims are speculative. The judgment was entered based upon the verdict of a jury which resolved conflicting facts bearing upon the issues of negligence and causation — issues plainly outside the criteria by which this Court exercises its discretionary jurisdiction. *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 26 (1954).

REASONS FOR DENYING THE WRIT

I.

THE COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI BECAUSE PETITIONERS FAILED TO ADEQUATELY RAISE THEIR CONSTITUTIONAL CLAIMS BELOW.

Petitioners allege jurisdiction under 28 U.S.C. § 1257(a). Jurisdiction is allegedly conferred by reason of a judgment “. . . rendered by the highest court of a State in which a decision could be had . . .” wherein “. . . any title, right, privilege, or immunity . . .” Petitioners “. . . have specially set up or claimed under the Constitution . . . of . . . the United States.” Specifically, petitioners claim a violation of procedural due process under the Fourteenth Amendment.

A. Petitioners Failed to Appeal the Judgment to the New Jersey Supreme Court.

New Jersey has a three-tiered judicial system. Original jurisdiction throughout the State is vested in the Superior Court which is separated into “Divisions” including the Law and Appellate Divisions. New Jersey Constitution, 1947 (hereafter “Const.”), Art. 6, § 3, ¶¶ 2 and 3. The within matter was originally venued in the Law Division. Appeals from final judgments in the Law Division may be taken as of right to the

second tier, Appellate Division. Const., Art. 6, § 5, ¶ 2 and N.J. Court Rule 2:2-3(a) (Appendix at 1a). The Supreme Court is the court of last resort. Const., Art. 6, § 2, ¶ 2 (Appendix at 1a).

Review of final judgments in the Supreme Court may be had either on direct appeal or certification as provided. Const., Art. 6, § 5, ¶ 1 provides:

1. Appeals to the Supreme Court

1. Appeals may be taken to the Supreme Court:

(a) In causes determined by the appellate division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) In capital causes;

(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the inferior courts; and

(e) In such causes as may be provided by law.

N.J. Court Rule 2:2-1 tracks the state constitutional criteria:

2:2-1. Appeals to the Supreme Court from Final Judgments

(a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right:

(1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.

(b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

Both the Constitution and Rule 2:2-1(a)(1) provide for an appeal "as of right" in cases "...involving a substantial' question arising under the Constitution of the United States...". Alternatively, a litigant may petition for certification, but review by the court is discretionary.⁵ Where there is a proper basis for an appeal as of right, non-constitutional claims will also be considered. *Kligman v. Lautman*, 251 A.2d 745, 53 N.J. 517 (1969).

Although entitled to review "as a right" of their constitutional claims, petitioners failed to appeal the judgment of the Appellate

5. While not expressly set forth in the Constitution, N.J. Court Rule 2:2-1(a)(1) includes a requirement that the constitutional question must be "substantial" for an appeal as of right. However, the substantiality requirement has nevertheless been construed as implicit in Article 6, § 5, ¶ 1. *Tidewater Oil Co. v. Mayor and Council of Carteret*, 209 A.2d 105, 44 N.J. 338 (1965).

6. The grounds for certification are set forth in N.J. Court Rule 2:12-4 at Appendix 2a. Generally, a question of "general public importance" or "special reasons" is required.

Division to the Supreme Court, but instead sought discretionary certification which was denied' (Petitioners' Appendix at 2a). Under these circumstances, respondent respectfully contends that this Court is without jurisdiction under 28 U.S.C. § 1257(a) since petitioners' claims were not presented to ". . . the highest court of [the] State in which a decision could be had . . .". *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

B. Petitioners Failed to Adequately Raise Their Constitutional Claims in the State Courts.

Even if petitioners' request for certification to the New Jersey Supreme Court instead of direct appeal of the judgment could be viewed as adequate for the purpose of invoking this Court's jurisdiction under 28 U.S.C. § 1257(a), petitioners never raised their due process claim in their petition for certification. Petitioners' brief and reply brief in support of their petition for certification are simply devoid of any argument that they were denied procedural due process under the Fourteenth Amendment. While such a claim was tangentially raised on appeal to the Appellate Division,⁸ it must be deemed to have been abandoned when petitioners sought review by the New Jersey Supreme Court.

Jurisdiction of this Court can arise ". . . only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S. Ct. 1889, 1892, 68 L.

7. While petitioners may have sought certification instead of directly appealing the judgment because of the "substantiality" requirement, it hardly behooves petitioners to advance such an argument here in view of this Court's criteria for granting certiorari.

8. Brief of Plaintiff-Appellants, Superior Court of New Jersey, Appellate Division, Point 1(d) at p. 52.

Ed. 2d 392, 397 (1981); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 17 S. Ct. 709, 711, 41 L. Ed. 1149 (1897).

Moreover, if respondent understands petitioners' argument that N.J. Court Rule 1:16-1 (Interviewing Jurors Subsequent to Trial), N.J. Evidence Rule 41 (Evidence to Test a Verdict) and N.J. Rule of Professional Conduct 3.5 (Lawyer Not to Influence Juror) somehow violate their right to due process, petitioners failed to mount any direct constitutional attack on those provisions in the state courts. In order to invoke this Court's appellate jurisdiction, an express challenge to the constitutionality of a state statute is required. *Mississippi Power v. Moore*, 487 U.S. ___, 108 S. Ct. 2428, 2437, 101 L. Ed. 2d 322, 337 (1988), n. 10 and *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 898, 99 L. Ed. 2d 75, 80 (1988), n. 4.⁹ Since none was advanced, respondent contends that the Court is without jurisdiction.

C. Petitioners' Constitutional Claims Were Not Decided in the State Courts Below.

To invoke this Court's jurisdiction, the federal question must not only have been raised, but also decided by the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162, 22 L. Ed. 2d 398, 400 (1969). If not passed upon, this Court may assume that the judgment rests on an adequate nonfederal ground,¹⁰ *Cardinale, supra*, and *Ellis v. Dixon*, 349 U.S. 458,

9. Respondent realizes that petitioners have not appealed, but seek a writ of certiorari. The cases cited were decided prior to the 1988 amendment of 28 U.S.C. § 1257 which eliminated this Court's appellate jurisdiction from the state courts under the former § 1257(2). To the extent that petitioners challenge the constitutionality of the aforesaid state rules, respondent urges that those decisions are persuasive.

10. *Cf.*, Point III herein.

464, 75 S. Ct. 850, 854, 99 L. Ed. 1231, 1236 (1955), or that the omission is for want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L. Ed. 2d 572, 579 (1969). Nothing in the proceedings below show that the state appellate courts actually decided the constitutional issues raised here by petitioners. The Appellate Division rendered a per curiam opinion which makes no mention of them, and the New Jersey Supreme Court merely issued an order denying the petition for certification (Petitioners' Appendix at 1a-5a).

D. The Petition is Procedurally Defective Because Petitioners Have Failed to Comply with Rule 21.1(h).

Petitioners' Statement of the Case is deficient under this Court's Rule 21.1(h). There is no specification by petitioners where the federal questions sought to be reviewed in this Court were raised, either in the trial or appellate courts. There are no "... pertinent quotations of specific portions of the record, or summary thereof . . ." to show that the federal questions were timely and properly raised so as to grant this Court jurisdiction to review the judgment. Under Rule 21.5, the Court may deny the petition for failure to comply.

II.

NO SPECIAL REASONS EXIST TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners jump to the conclusion that the jury verdict was the product of speculation based upon requests for certain testimony to be read back. They then color this alleged speculation "jury misconduct," and, in what can be only characterized as a quantum leap, argue that the jury violated their right to

procedural due process under the Fourteenth Amendment. In the only place where petitioners raised this unique theory below, they candidly admitted, "No case has been discovered in which a constitutional grievance has been laid at the feet of jurors themselves . . .".¹¹

However, review on certiorari is not a matter of right, but of discretion, and is only granted when there are special and important reasons. Rule 17. Review on certiorari does not provide a normal appellate channel in any sense comparable to a writ of error. *Fay v. Noia*, 372 U.S. 391, 436, 83 S. Ct. 822, 847, 9 L. Ed. 2d 837, 867 (1963). While petitioners may have developed what they considered to be a novel constitutional theory, " 'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1954). Even where petitioner may raise a federal question "of substance," this Court does sit to satisfy a scholarly interest in such issues. *Rice, supra*. Certiorari is granted only where the case involves principles the settlement of which is important to the public as distinguished from the parties. *N.L.R.B. v. Pittsburgh Steamship Co.* 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479, 482 (1951).

The petition fails to satisfy, nor does it attempt to satisfy, any of the criteria typically considered by the court for granting certiorari. *Cf.*, Rule 17.1(b) and (c). While petitioners undoubtedly feel that the issues are of great concern to themselves, they in no way justify the expenditure of this Court's limited resources.

11. Brief of Plaintiff-Appellants, Superior Court of New Jersey, Appellate Division, Point I(d) at p. 52.

III.

PETITIONERS' FAILURE TO OBJECT TO THE CHARGE OR THE PORTIONS OF TESTIMONY WHICH WERE READ BACK TO THE JURY CONSTITUTE AN INDEPENDENT AND ADEQUATE STATE GROUND TO SUPPORT THE JUDGMENT.

To the extent that the trial court's failure to charge "loss of a chance" under *Evers v. Dollinger*, 471 A.2d 405, 95 N.J. 399 (1984) and its alleged mistake in having the incorrect testimony read back to the jury even remotely imply some constitutional defect, petitioners have waived appellate review by failing to make appropriate and timely objections.¹² New Jersey follows the traditional rule which requires a timely objection to evidence or the court's charge in order to preserve the issue for appellate review. N.J. Court Rule 1:7-2 provides:

For the purpose of reserving questions for review or appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which he desires it to take or his objection to the action taken and the grounds therefor. Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), no party may urge as error any portion of the charge to the jury or omissions therefrom unless he objects thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury. If a party has no

12. Petitioners conceded in their petition for certification to the New Jersey Supreme Court at p. 16 that they made no objection to the charge, and urged "plain error."

opportunity to object to a ruling, order or charge, the absence of an objection shall not thereafter prejudice him.

Obviously, the purpose of the rule is to give the court an opportunity to reconsider its rulings and correct any alleged errors. *Gluckauf v. Pine Lake Beach Club, Inc.*, 187 A.2d 357, 78 N.J. Super. 8, 18 (App. Div. 1963). Except in the case of "plain error" which is discretionary and "... should be sparingly employed," New Jersey appellate courts will not review matters which were not preserved below. *Ford v. Reichert*, 129 A.2d 439, 23 N.J. 429, 433 (1957). See also, *Gaido v. Weiser*, 545 A.2d 1350, 227 N.J. Super. 175 (App. Div. 1988), *aff'd*, 558 A.2d 845, 115 N.J. 310 (1989).

There was no objection by petitioners to the charge given by the trial judge below, and no request for a "loss of a chance" charge (26T221:12-16). To the same effect, petitioners failed to object to any testimony which was read back in response to the requests of the jury (26T243-248). Moreover, the trial judge invited the jury to request additional testimony if the passages selected were wrong (26T245:2-18). Thus, petitioners failure to make appropriate and timely objections in the trial court constitute an independent and adequate state ground for affirmance of the judgment by the courts below.

IV.

THE PETITION SHOULD BE DENIED BECAUSE THE RECORD DOES NOT DEMONSTRATE ANY VIOLATION OF PETITIONERS' RIGHT TO DUE PROCESS.

The judgment entered in this case did not turn upon a violation of petitioners' right to due process, but rather upon resolution by a jury of conflicting facts bearing upon the issues

of negligence and causation. As Mr. Justice Frankfurter stated in *McAllister v. United States*, 348 U.S. 19, 23, 75 S. Ct. 6, 9, 99 L. Ed. 26 (1954):

. . . If there is any class of cases which plainly falls outside of the professed considerations by which this court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts becomes the bone of contention. [Concurring opinion]

Petitioners have latched onto the jury's request for the testimony of Dr. Oberhand concerning the continuity of headaches to imply a verdict based upon speculation which infers misconduct, which, in turn, is alleged to be a violation of procedural due process. But the record is replete with references to both "a headache" and "headaches" suffered by petitioner Rose O'Grady between March 2 and March 16, 1983. Petitioners' daughter testified to "very bad headaches." (19T22:14). Petitioner Frank O'Grady was questioned on direct about his wife's "headaches" and testified that they disappeared on March 16 (19T148:3-22). On the hypothetical question proposed to petitioners' expert, Dr. Duncan, reference was made to "headaches." (20T46:19, 20T47:3, 20T47:20). Dr. Duncan also agreed on cross examination that there was a possible basis to attribute petitioner's "headaches" to the sinus problem (20T105:13-21) and the testimony of Dr. Franz was laced with references to "headaches." (24T79:15-23, 24T81:21, 24T87:22-88:4, 24T105:6-25).

On cross examination, Dr. Oberhand referred to ". . . the plural headaches." (25T76:5-10). He testified that the petitioner's description of the headaches was, ". . . 'They're back again' type

of situation." In other words, similar to all the other headaches (25T81:6-16).

Clearly, the issue of whether petitioner had a single constant headache or a series of headaches, and the inferences to be drawn therefrom were questions for the jury and the only flawed reasoning concerning same is that which is incorporated in petitioners' argument. It is the petitioners, rather than the jury, who have engaged in speculation. See the opinion of the Superior Court, Appellate Division, Petitioners' Appendix at pp. 4a-5a. On petitioners' motion for a new trial, the trial judge remarked in his oral opinion denying the application that, not only would he have voted along with the jury to exonerate the respondent, but he felt the evidence was so strong, that respondent would have prevailed even if he had the burden of proof.

... Not only that, but the testimony was, which support, more than supports, that had the Defendant Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think that he would have met that burden, had that burden had been on the other side. [4/24T17:9-15; Petitioners' Appendix at pp. 12a-13a]

The verdict of the jury is not only supported by adequate credible evidence in the record, it is right and should not be disturbed.

The remainder of petitioners' arguments concerning the adequacy of the court's charge to the jury, and in particular, its failure to charge "loss of a chance" pursuant to *Evers v. Dollinger*, *supra* and *Hake v. Manchester Township*, 486 A.2d 836, 98 N.J. 302 (1985), if not waived by petitioners for failing to object to the charge, raise issues solely of state law which this Court has no jurisdiction to review under 28 U.S.C. § 1257.

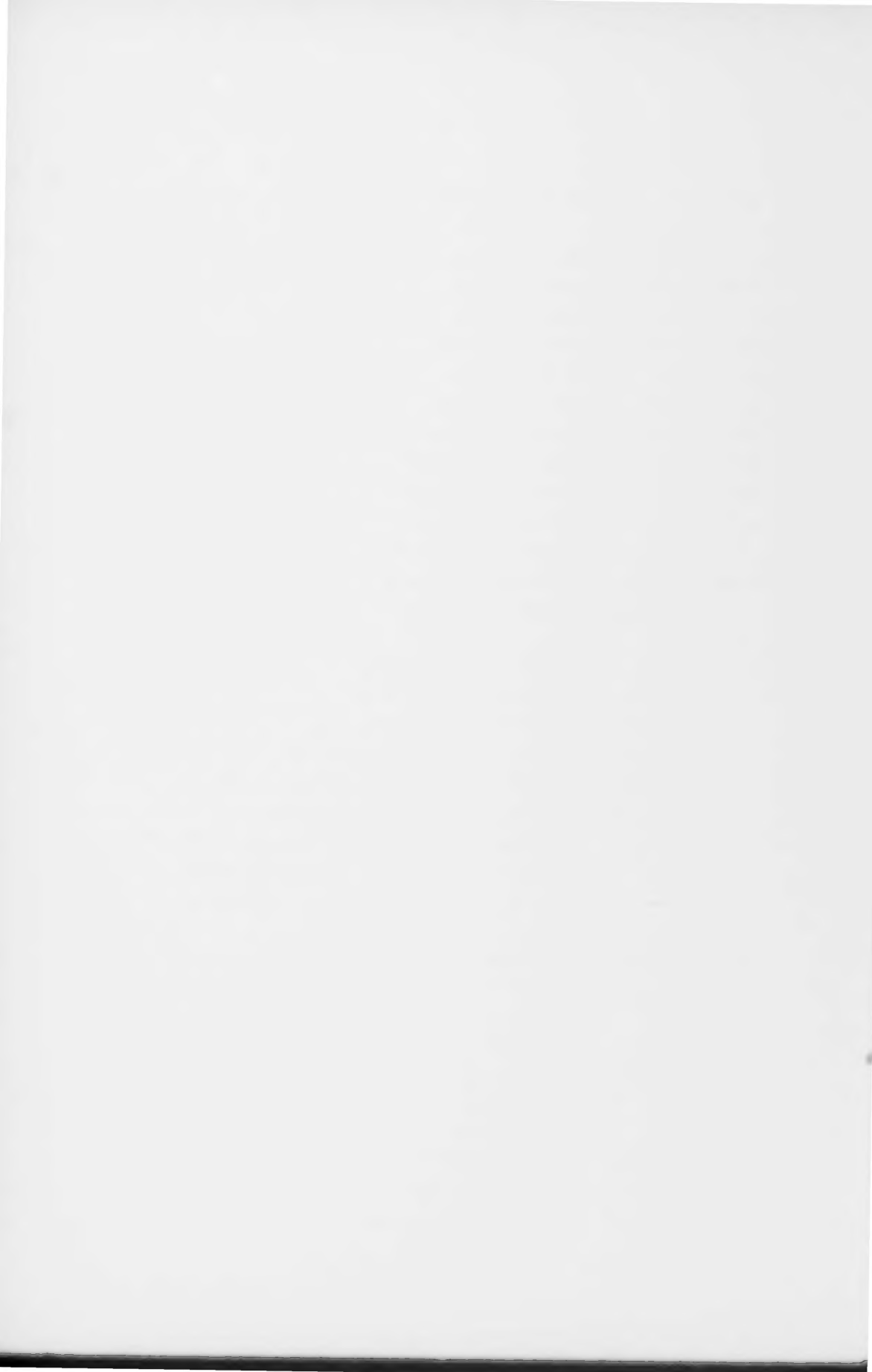
CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. MC GEE
MC DERMOTT & MC GEE
Attorneys for Respondent
Robert I. Oberhand, M.D.

Dated: Millburn, New Jersey
April 2, 1990



APPENDIX

New Jersey Constitution, 1947

Art. 6, § 5, ¶ 2:

2. Appeals to Appellate Division of Superior Court

2. Appeals may be taken to the Appellate Division of the Superior Court from the Law and Chancery Divisions of the Superior Court, and in such other causes as may be provided by law.

Art. 6, § 2, ¶ 2:

2. Supreme Court, appellate jurisdiction

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution.

New Jersey Court Rules

Rule 2:2-3 [Part]:

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by R. 2:21(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right.

Appendix

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts; . . .

Rule 2:12-4:

2:12-4. Grounds for Certification

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

